IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1739

GEORGE PETTUS, *Petitioner,*

v.

AMERICAN AIRLINES, INC., ET AL., *Respondents.*

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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OPINIONS BELOW

There are three unreported decisions in this matter. The decision and order of Samuel J. Smith, Administrative Law Judge is contained in Appendix A. The opinion of the Industrial Commission is contained in Appendix B. The opinion of Commissioner Miller of the Industrial Commission of Virginia is contained in Appendix C.

JURISDICTION

Respondent contests that the second petition for rehearing or rehearing en banc was timely filed. Respondent assumes that the petitioner has invoked jurisdiction of this Court under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

May the petitioner re-litigate a factual issue which was the subject of a final judgment in another forum where there was an identity of burdens in the two proceedings?

STATEMENT OF THE CASE

George Pettus was employed by American Airlines, Inc. in 1969, to work at National Airport in the Commonwealth of Virginia. On or about May 10, 1972, Pettus injured his lower back while unloading cargo from an airplane. He was paid compensation under the laws of the State of Virginia at the rate of $62.00 per week from May 10, 1972 to July 1, 1972, and from July 15, 1972 to May 16, 1973. An application was filed with the Industrial Commission of Virginia by the insurance carrier, requesting the termination of compensation on May 16, 1973. The grounds for the application were the fact that the claimant had unjustifiably refused to have medically recommended back surgery. The attending orthopedic surgeon, Dr. S. M. Levin, recommended surgery to correct the claimant's back condition. The claimant refused, stating that he could not get the doctor to guarantee the results, and, therefore, would not undergo the surgery. A period of conservative treatment was attempted, but, finally, the orthopedic surgeon concluded that surgery was necessary to restore the claimant to an employable status.

As a result of a hearing held in Alexandria, Virginia, on September 18, 1973, Commissioner Miller of the Industrial Commission of Virginia, found that the claimant's refusal to accept the recommended back surgery was not justified, and entered an order suspending and terminating payment of compensation. On February 11, 1974, the full Industrial Commission of Virginia affirmed the findings of Commissioner Miller, and adopted his decision as that of the full Commission. No appeal was taken to the Supreme Court of Virginia by the claimant; therefore, under the provisions of the Virginia Workmen's Compensation Act, the decision was final.

On June 28, 1974, Pettus filed a claim for compensation under the District of Columbia Workmen's Compensation Law. On December 10, 1974, a hearing was held before Administrative Law Judge Smith in Washington, D.C. Judge Smith found that the claim did not come within the jurisdiction of the District of Columbia Workmen's Compensation Act. By a decision dated March 19, 1976, the Benefits Review Board reversed Judge Smith, finding that the fact that the employee was a resident of the District of Columbia was sufficient to confer jurisdiction under the Act.

Administrative Law Judge, Robert S. Amery, awarded compensation to the claimant by his Order of May 12, 1976. In a Supplemental Order, dated December 9, 1976, Judge Amery reviewed and re-examined his two prior decisions in the case and adopted them without any changes.

Notwithstanding the finding of the Virginia Industrial Commission, he found that the employee's refusal to submit to surgery was neither unreasonable nor unjustified under the circumstances. The Benefits Review

Board affirmed the decision and the award of benefits for temporary total disability ordered by Judge Amery.

In an opinion written by senior Circuit Judge Albert V. Bryan, this Order of the Benefits Review Board was vacated on September 26, 1978. Petitions for rehearing or rehearing en banc were filed on behalf of Pettus and the Director, Office of Workers' Compensation Programs, United States Department of Labor, and denied by Order dated January 4, 1979. Without leave of court, Pettus and the Director filed second petitions for rehearing or rehearing en banc. These petitions were denied on March 14, 1979. A Petition for a Writ of Certiorari was docketed in this Court on May 21, 1979.

ARGUMENT

The Petition For A Writ Of Certiorari Was Untimely Filed

Section 2101(c) of Title 28 of the United States Code provides that a petitioner must apply for a Writ of Certiorari within ninety days after the entry of the judgment in question. In the present case, judgment was entered on September 26, 1978; however, the ninety-day period for presenting a Petition for a Writ of Certiorari was tolled by the timely filing of petitions for rehearing on October 10, 1978. These petitions for rehearing were denied on January 4, 1979, and pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure,the mandate of the appellate court was issued on January 11, 1979. Notwithstanding the fact that successive petitions for rehearing are not authorized by statute or rule, petitioners, without leave of court or motion, filed second petitions for rehearing after the mandate had issued. These petitions were summarily denied on March 14, 1979.

It is well-settled that the ninety-day period for application to this Court for a Writ of Certiorari will not be suspended by the presentation of a motion for leave to file a second request for rehearing. *Morse* v. *United States,* 270 U.S. 151, 70 L.Ed. 518, 46 S.Ct. 241. It is equally well-settled that if a motion for leave to file a second petition for rehearing is granted, and the petition is actually entertained by the court, then the ninety-day period for application to this Court begins upon the date when the petition is denied. *Gypsy Oil Co.* v. *Escoe,* 275 U.S. 498, 48 S.Ct. 112, 72 L.Ed. 393.

The filing of a second petition for rehearing without leave of court should not be permitted to toll the ninety-day limitation period. Petitioner did not seek leave to file a second petition for rehearing, but merely filed such petition reiterating the argument contained in his initial petition for rehearing which the court found wanting. If this Court permits, expressly or impliedly, successive petitions for rehearing without leave of court, appellate litigation may prove interminable. Petitioner should not be permitted to profit from his display of hubris in presenting a second petition for rehearing without seeking the leave of court. This Court should treat such petition as a nullity and find that the Petition for a Writ of Certiorari is untimely.

The Court Of Appeals' Opinion Below Is Clearly Distinguishable From *Newport News Shipbuilding & Dry Dock Co.* v. *Director, OWCP,* — F.2d —, No. 77-1886 (Sept. 21, 1978), And Is Consonant With The Decisions Of This Court.

Petitioner seeks a Writ of Certiorari from this Court on the grounds that the decision of the Court of Appeals below conflicts with the interpretation of *Industrial Commission of Wisconsin* v. *McCartin,* 330

U.S. 622, 67 S.Ct. 886, 91 L.Ed. 1140, found in *Newport News Shipbuilding & Dry Dock Co.* v. *Director, Office of Workers' Compensation Programs,* No. 77-1886 (4th Cir., Sept. 21, 1978), and the decision of the Fifth Circuit Court of Appeals in *Young & Co.* v. *Shea,* 397 F.2d 185 (5th Cir. 1968), *cert. denied,* 395 U.S. 920 (1969). These alleged conflicts dissolve when the issue is construed within the limited factual context of this case, rather than the broadly formulated issue presented by the petitioner.

Petitioner has sought to characterize the issue in this case as whether successive awards can be made under the workers' compensation laws in Virginia and the District of Columbia for the same injury. In doing so, petitioner has attempted to frame his argument so as to require this Court to choose between *Magnolia Petroleum Co.* v. *Hunt,* 320 U.S. 430, 64 S.Ct. 208, 88 L.Ed. 149, and *Industrial Commission of Wisconsin* v. *McCartin, supra.* A review of the record belies this facile approach. The factual situation with which this Court is presented differs markedly from the situations which faced the *Magnolia* Court and the *McCartin* Court. In the present case, the petitioner received a Virginia award which was subsequently terminated by the Industrial Commission of Virginia on a factual finding that the petitioner had unjustifiably refused to undergo recommended back surgery. It is beyond dispute that this determination made by the Virginia Commission was based on a full and fair adjudication of the legal and evidential factors. Petitioner chose not to appeal this decision of the Virginia Commission, but rather four months later filed a claim for compensation under the District of Columbia Workmen's Compensation Act. 36 D.C. Code § 501, et seq.

The issue before this Court is not whether an award of the Industrial Commission of Virginia bars petitioner from seeking an award under the worker's compensation laws of another jurisdiction, but whether, under the guise of *McCartin, supra,* petitioner may relitigate the reasonasbleness of his refusal to undergo surgery following a final factual determination that such refusal was unjustified. It is this factual determination which the lower court held was entitled to full faith and credit.

In the *Newport News* case, the claimant Jenkins was denied benefits under the Virginia Workmen's Compensation program and a finding by a Commissioner of the Industrial Commission of Virginia that the injury did not arise out of or in the course of employment. This finding was affirmed by the full Commission. Subsequently, Jenkins filed a claim for compensation under the Federal Longshoremen's & Harbor Workers Compensation Act. 33 U.S.C. § 901, et seq. In that proceeding, Jenkins was found to be engaged in "maritime employment" under the Act, and was awarded compensation for a temporary partial disability.

In both *Newport News* and the present case, the respective panels examined the "exclusivity" provision of the Virginia Compensation statute. Section 65.1-40, Virginia Code, (1950), as amended. In *Newport News,* the opinion correctly noted:

> Virginia itself has long recognized that where the Industrial Commission dismisses a claim upon a finding that the injury did not arise out of or in the course of employment, as it did in this case, § 65.1-40 is not to be interpreted to bar the employee from pursuing other available remedies. *Newport News Shipbuilding & Dry Dock Co.* v.

Director, OWCP, (4th Cir. 1978), Slip Opinion at 7.

Such cannot be said of the present case. The Industrial Commission determined that Pettus' injury did arise out of the employment, but further decided that he unreasonably refused surgical treatment. This order was not appealed, and became a final judgment, pursuant to § 65.1-98, 1950 Code of Virginia, as amended. It is not within the jurisdictional exception to § 65.1-40 noted by the *Newport News* case decision, and, pursuant to § 65.1-40, it does "operate as an absolute bar to any other action on the same facts in the courts of Virginia," at common law or otherwise, *Pettus* v. *American Airlines, Inc.,* (4th Cir., 1978), 587 F.2d 627, 629.

Since even under controlling Virginia law, *see Griffith* v. *Raven Red Ash Coal Co.,* 179 Va. 790, 20 S.E.2d 530 (1942), the decision of the Industrial Commission in *Newport News* could not bar the employee from pursuing other available remedies, and the Court held:

> . . . it is obvious *especially from our discussion of the 'exclusivity' provision of the Virginia statute,* (emphasis added), that the reasoning of [McCartin], not *Magnolia* is controlling in this case, and that no valid 'full faith and credit' issue is raised by the federal award. *Newport News Shipbuilding and Dry Dock Co.* v. *Director, OWCP,* Slip Opinion at 9.

No valid full faith and credit issue was raised by the federal award in *Newport News,* since there was merely a finding by the Industrial Commission that they did not have jurisdiction; that the claimant was in the wrong forum.

The Industrial Commission decision received the same full faith and credit which it would have received in a Virginia Court. *See, Perrin* v. *Brunswick Corp.,* 333 F.Supp. 221 (W.D.Va., 1971); *Griffith* v. *Raven Red Ash Coal Co., supra.*

In contrast, the decision of the Industrial Commission in *Pettus* would be given res judicata effect in the Virginia courts, and is entitled to the same full faith and credit in every court within the United States, as it has in the courts of Virginia. 28 U.S.C. § 1738.

In light of the differing applicability of the Virginia "exclusivity" statute to the decision of the Industrial Commission in *Newport News* from the decision of the Industrial Commission in *Pettus,* the respective panels of this Court correctly held that *Industrial Commission* v. *McCartin,* 330 U.S. 622, governed on the facts of *Newport News,* since the Virginia Code, § 65.1-40 did not apply, and that *Magnolia Petroleum Co.* v. *Hunt,* 320 U.S. 430, governed on the facts of *Pettus,* since Virginia Code § 65.1-40 did apply.

Where There Exists An Identity Of Issues And An Identity Of Burdens Between Two Proceedings, The Doctrine Of Collateral Estoppel Is Applicable.

Under the doctrine of collateral estoppel, a judgment precludes re-litigation of issues which were actually litigated and determined in the prior suit, regardless of whether the same cause of action is the object of both suits. *Commissioner* v. *Sunnen,* 333 U.S. 591, 68 S.Ct. 715; *Lawlor* v. *National Screen Service Corp.,* 349 U.S. 322, 75 S.Ct. 865. Petitioner reasserts the argument which was found wanting by the Court of Appeals below. He claims that a different issue was before the Benefits Review Board than that decided by the

Virginia Industrial Commission due to the allegedly different statutory standards and allegedly different burden of proof.

Petitioner would have this Court construe the D.C. Act to require a finding that the employee's refusal of surgical services was unreasonable and a separate finding that it was unjustified; whereas, the Virginia Act requires a finding only that the refusal was unjustifiable. Petitioner would have this Court disregard the plain meaning of 33 U.S.C. § 907(d) under the guise of liberal interpretation. See generally, *Nardella* v. *Campbell Machine, Inc.*, 525 F.2d 46 (9th Cir. 1975). The Court below ignored this semantic facade and found that:

> The common issue is thus whether the employee's refusal was 'justified' under the circumstances as expressed in the State law, or 'unreasonabl[e]' as the District of Columbia law puts it. *Pettus* v. *American Airlines, Inc.*, 587 F.2d 627, 629.

Also, petitioner argues that the burden of proof differs substantially between the D.C. proceeding and the Virginia proceeding. There are various statutory presumptions under the D.C. Act which do distinguish the burden of proof from the burden imposed by the Virginia Act. 33 U.S.C. § 920. The issue of refusal of surgical treatment is not presumed in favor of the claimant under the aforementioned statute and the burden of proof remains on the claimant. "Under 33 U.S.C. § 903(a), the claimant has the burden of proving all that is not presumed under § 920." *Young & Co.* v. *Shea*, 397 F.2d 185, 188, *rehearing denied*, 404 F.2d 1059 (5th Cir.(1968), *cert. denied*, 395 U.S. 920 (1969). The petitioner analogizes the claimant's burden before the Industrial Commission to that of a civil jury trial.

Ignored are the various pronouncements by the Supreme Court of Virginia that the Workmen's Compensation Laws are to be afforded a liberal construction in favor of the employee to accomplish their humane purpose. See 21A, Michie's Jurisprudence, *Workmen's Compensation*, § 3, and cases cited therein. Also ignored by the petitioner is the Industrial Commission Rule 1, which provides:

> The Commission will not be bound by statutory or common law rules of pleading or evidence, nor by any technical rules of practice in conducting hearings, but will conduct such hearings and make such investigations in reference to the questions at issue in such manner as in its judgment are held adapted to ascertain and determine expeditiously and accurately the substantial rights of the parties and to carry out justly the spirit of the Workmen's Compensation Act, and to that end, hearsay evidence may be received.

In view of this Rule, the Supreme Court of Virginia has found that hearsay evidence may alone constitute the basis for an award. *See Williams* v. *Fuqua*, 199 Va. 709, 101 S.E.2d 562; *Derby* v. *Swift*, 188 Va. 336, 49 S.E.2d 417. Notwithstanding his volume of authority, petitioner claims, without citation, that "the general approach to the District's Compensation Act is less stringent than in Virginia." Petition for a Writ of Certiorari, p. 15. This blanket conclusion is employed to create an apparent conflict with decisions from the Fifth Circuit Court of Appeals. *Young & Co.* v. *Shea, supra; Strachan Shipping Co.* v. *Shea*, 276 F.Supp. 610 (S.D.Tex. 1967) *aff'd per curiam*, 406 F.2d 521 (5th Cir. 1969) *cert. denied*, 395 U.S. 921 (1969). The cited cases deal with the application of the doctrine of collateral estoppel to an administrative proceeding

based upon a factual determination made by a jury during a civil trial. These cases are clearly distinguishable from the present case in which the initial factual determination was made in an administrative proceeding in which the petitioner enjoyed the identical procedural advantages as would be accorded him under the proceedings held pursuant to the District of Columbia Compensation Act. It is respectfully submitted that there was an identity of issue in both proceedings and an identity of burdens which the Benefits Review Board was compelled to accept under the doctrine of collateral estoppel.

CONCLUSION

For the aforementioned reasons, it is respectfully submitted that this Honorable Court should deny the Petition for a Writ of Certiorari filed herein.

Respectfully submitted,

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APPENDIX

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20210

Case No. 75-DCWC-19

OWCP No. 40-79352

In the Matter of

GEORGE PETTUS, *Claimant*

v.

AMERICAN AIRLINES, INC., *Employer*

and

COMMERCIAL INSURANCE COMPANY OF NEWARK, NEW JERSEY, *Carrier*

JAMES A. MANNINO, ESQ.
Counsel for Claiman

JOSEPH DYER, ESQ.
Counsel for Employer and Carrier

Before: SAMUEL J. SMITH, *Administrative Law Judge.*

DECISION AND ORDER

Filed August 13, 1975

Jurisdiction and Procedural History

This is a claim for compensation under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as extended to include the District of Columbia Workmen's Compensation Act. This case is before the undersigned Administrative Law Judge for formal hearing in accordance with Section 19(d) of the Longshoremen's and Harbor Workers' Compensation Act, as amended (hereinafter referred to as the Act).

Pursuant to due notice a hearing was held in Washington, D.C. on December 10, 1974, in accordance with the Administrative Procedures Act, 5 U.S.C. § 551 *et seq.* The Claimant appeared in person and was represented by James A. Mannino, Esq., of Washington, D.C. The Respondents were represented by Joseph Dyer, Esq., of Arlington, Virginia. The Solicitor of Labor did not make an entry of appearance on behalf of the Director, Office of Workers' Compensation Programs.

Counsel were afforded full opportunity to adduce evidence, to call, examine and cross-examine witnesses, and to make oral argument. Counsel have submitted post-hearing written briefs in support of their respective positions. In addition thereto, Counsel for Claimant has filed an application for an award of attorney's fees. These documents have been duly considered and made a part of the record in this case.

Issues

The issues presented by this case are: (1) Whether or not the claim filed herein is properly within the jurisdiction of the Longshoremen's and Harbor Workers' Compensation Act, as extended to include the District of Columbia Workmen's Compensation Act; (2) Whether or not the final administrative determination by the Industrial Commission of Virginia, in a compensation case arising out of the same injury, precludes recovery by the Claimant in this case based on the legal principles of *res adjudicata, collateral estoppel* or *estoppel by judgment;* and (3) Whether or not the Claimant has unreasonably refused to submit to surgical treatment, so as to bar his receipt of compensation within the meaning of Section 7(d) of the Act, as amended. (33 U.S.C. § 907(d).

Stipulation of Parties

At the outset of the formal hearing, Counsel for the parties stipulated and agreed that there was no dispute to the following matters:

1. The Claimant was injured on May 10, 1972 while working within the scope of his employment with the Respondent, American Airlines.
2. A causal relationship exists between the injury sustained by the Claimant on May 10, 1972 and his present disability.
3. Claimant had average weekly wages in the sum of $210.00 at the time of his injury.
4. An Employer-Employee relationship existed between the Claimant and the Respondent, American Airlines at the time of the injury to the Claimant.
5. Claimant received compensation under the Workmen's Compensation laws of the State of Virginia, as a result of the May 10, 1972 injury from May 10, 1972 to July 1, 1972 and July 15, 1972 to May 16, 1973, at the rate of $62.00 per week.

Statement of the Case

Claimant, George Pettus, a widower, age 37, resides at 2521 Elvins Road, S.E., Washington, D.C. with his three children. During 1969 the Claimant while seeking employment was informed by the UPO Employment Service at 1000 U Street, N.W., Washington, D.C., that the Respondent, American Airlines had some job openings. Subsequently, Claimant returned to the employment agency for an interview with American Airlines' personnel. Claimant was informed that he would be employed by American Airlines. Claimant was informed to return to the employment agency the next day, where Claimant and several other men were transported to National Airport for processing by the American Airlines' Personnel Department.

Claimant was assigned to perform duties for American Airlines at National Airport, which is located in the State of Virginia. Claimant continued to reside in the District of Columbia and commuted each day to his job with American

Airlines at National Airport. On or about May 10, 1972, Claimant injured his low back while unloading cargo from an airplane. Claimant was paid compensation under the laws of the State of Virginia at the rate of $62.00 per week from May 10, 1972 to July 1, 1972, and from July 15, 1972 to May 16, 1973. Compensation payments were terminated by the Respondent, American Airlines, upon the ground that Claimant had refused to have medically recommended back surgery (spinal fusion).

As the result of a hearing held in Alexandria, Virginia on September 18, 1973, Commissioner Miller of the Industrial Commission of Virginia, found that the Claimant's refusal to accept the recommended back surgery was not justified, and entered an order suspending and terminating payment of compensation. On February 11, 1974, the full Industrial Commission of Virginia affirmed the findings of Commissioner Miller and adopted his decision as that of the full Commission. On June 28, 1974, Claimant filed a claim for compensation under the District of Columbia's Workmen's Compensation Law.

Evaluation of the Stipulations, Evidence and Law

It is both appropriate and necessary to first consider the jurisdictional issue in this case. In so doing, it is further appropriate, at the outset, to review the contentions of the parties with respect to jurisdiction.

The Claimant contends jurisdiction properly lies under the Longshoremen's and Harbor Workers' Compensation Act, as extended to include the District of Columbia Workmen's Compensation Act, since there existed a substantial connection between the District of Columbia and the particular Employer-Employee relationship that existed between the Claimant and the Respondent, American Airlines. In support of this proposition Counsel for Claimant has cited a line of cases beginning with *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U.S. 469, 67 S. Ct. 801, 91 L. ed. 610 (1947).

The Respondents, on the other hand, assert that jurisdiction does not lie in this case under the Longshoremen's and Harbor Workers' Compensation Act, as extended to include the District of Columbia Workmen's Compensation Act, since a substantial connection did not exist between the District of Columbia and the particular Employee-Employer relationship in this case.

Consideration of the jurisdictional issue must begin with a review of the United States Supreme Court decision in *Cardillo* v. *Liberty Mutual Insurance Co., supra,* wherein the Court interpreted the coverage provision of the District of Columbia Workmen's Compensation Act. The Court held in part at p. 805:

> "We hold that the jurisdiction objection is without merit in light of these facts. Nothing in the history, the purpose or the language of the Act warrants any limitation which would preclude its application to this case. The Act in so many words applies to every employee of an employer carrying on any employment in the District of Columbia, 'irrespective of the place where the injury or death occurs.' Those words leave no possible room for reading in an implied exception excluding those employees like Ticer who have substantial business and personal connections in the District and who are injured outside the District. Whether this language covers employees who are more remotely related to the District is a matter which we need not now discuss and any arguments based upon such hypothetical situation are without weight in this case.

Accordingly the Court found jurisdiction sufficient to award compensation to the widow of a District of Columbia resident, employed as an electrician by a District of Columbia electrical contractor, who died in an automobile accident near Fort Belvoir, Virginia, while returning from his assigned job at a project located on the Quantico Marine Base. Before arriving at its conclusion, the Court enumer-

ated several substantial contacts among the employee, the employer and the District, which it considered in determining that there was sufficient legitimate interest of the District in that Employer-Employee relationship to warrant application of the Act. Substantial contacts enumerated by the Court included the following: employee's residence; employer's place of business; employer's principal area of operations; place of contract of hire; employee's principal place of employment over a period of years; place from which employee received direction concerning his work while employed outside the District; whether employee was subject to transfer back to the District; place employee was paid from; whether employee received a travel expense allowance from the District. The Court did not state whether one, some or all of these factors were necessary to substantiate its finding jurisdiction to apply the extra-territorial provision of the Act. However, the Court did seem to indicate that other persons more remotely related to the District of Columbia might not be covered by the Act.

The Benefits Review Board-Labor preceived the importance of the Supreme Court decision in *Cardillo, supra,* in its decision rendered in *Ekar* v. *International Union of Operating Engineers* et als., 1 BRBS 406 (April 11, 1975) and *Riley* v. *Eureka Van and Storage Company,* 1 BRBS 449 (May 6, 1975), wherein the Board applied standards and guidelines of the Supreme Court, set forth herein.

In resolving the jurisdictional issue, this Administrative Law Judge will apply and consider the same factors in this case as the Supreme Court deemed to be "substantial contacts" in *Cardillo, supra.* A review of the record as a whole indicates that the Claimant has the following business and personal contacts with the District of Columbia:

1. Claimant resided in the District of Columbia during his entire period of employment with the Respondent, American Airlines.

2. District of Columbia Income Tax was withheld from the Claimant's earnings, while employed by the Respondent, American Airlines.
3. Claimant was interviewed by American Airlines in the District of Columbia for the position at National Airport.
4. Respondent, American Airlines, maintains one administrative office and two ticket offices in the District of Columbia.

It must further be pointed out that the following listed "substantial contacts" found and considered in *Cardillo, supra,* are lacking and not present in this case:

1. The Respondent, American Airlines, has its principal area of operations at National Airport, in the State of Virginia.
2. Respondent, American Airlines, has its principal place of business at National Airport, in the State of Virginia.
3. Respondent, American Airlines, maintains its personnel and employment office at National Airport, in the State of Virginia.
4. All supervision and direction concerning the Claimant's work came from American Airlines' personnel located at National Airport, in the State of Virginia.
5. American Airlines had no position in the District of Columbia in Claimant's job classification, to which the Claimant could be transferred.
6. Claimant never at any time performed any work activity within the District of Columbia for the Respondent, American Airlines.
7. Claimant was not paid a travel allowance by the Respondent, American Airlines for his daily trip

from his residence in the District of Columbia, to his place of employment at National Airport, in the State of Virginia.

8. Claimant received his paychecks from American Airlines at National Airport in the State of Virginia.

9. Claimant's period of employment commenced for American Airlines at National Airport in the State of Virginia.

The above comparison vividly illustrates the remote business and personal connections of the Claimant, to the District of Columbia. Unlike *Ekar, supra,* and *Riley, supra,* the Claimant never performed any work activity for American Airlines in the District of Columbia. Unlike *Ekar, supra,* and *Riley, supra,* Claimant's supervisor was located at National Airport in the State of Virginia. Other distinctions between this case and *Cardillo, Ekar* and *Riley, supra,* are rather obvious and need not be set forth in detail herein. It is concluded that the Claimant's business and personal connections with the District of Columbia are too remote to vest jurisdiction, under the Longshoremen's and Harbor Workers' Compensation Act, as extended to include the District of Columbia Workmen's Compensation Act, to the Claimant's work activities for the Respondent, American Airlines at National Airport in the State of Virginia. Thus it is determined that the claim filed herein by the Claimant does not come within the jurisdiction of the District of Columbia Workmen's Compensation Act. In view of the findings contained herein it would be inappropriate for this Administrative Law Judge to consider the other issues raised in this case.

It is thus determined that the Claimant's claim for compensation filed herein for benefits under the District of Columbia Workmen's Compensation Act must be denied.

Findings

After careful review of the record in its entirety, the stipulations of Counsel, my observation of the witnesses and their demeanor, specific findings are made as follows:

1. Claimant, George Pettus, filed a claim on June 28, 1974, for compensation under the Longshoremen's and Harbor Workers' Compensation Act, as extended to include the District of Columbia Workmen's Compensation Act.

2. The Claimant was injured on May 10, 1972 while working within the scope of his employment with the Respondent, American Airlines, in the State of Virginia.

3. A causal relationship exists between the injury sustained by the Claimant on May 10, 1972 and his present disability.

4. Claimant had average weekly wages in the sum of $210.00 at the time of his injury.

5. An Employer-Employee relationship existed between the Claimant and the Respondent, American Airlines, at the time of the injury to the Claimant.

6. Claimant received compensation under the Workmen's Compensation laws of the State of Virginia, as a result of the May 10, 1972, injury, from May 10, 1972 to July 1, 1972, and July 15, 1972 to May 16, 1973, at the rate of $62.00 per week.

7. Claimant resided in the District of Columbia during his entire period of employment with the Respondent, American Airlines.

8 District of Columbia Income Tax with withheld from the Claimant's earnings, while employed by the Respondent, American Airlines.

9. Claimant was interviewed by American Airlines in the District of Columbia, for the position at National Airport.

10. Respondent, American Airlines, maintains one administrative office and two ticket offices in the District of Columbia.

11. The Respondent, American Airlines, has its principal area of operations at National Airport, in the State of Virginia.

12. Respondent, American Airlines, has its principal place of business at National Airport in the State of Virginia.

13. Respondent, American Airlines, maintains its personnel and employment office at National Airport, in the State of Virginia.

14. All supervision and direction concerning the Claimant's work came from American Airlines' personnel located at National Airport, in the State of Virginia.

15. American Airlines had no position in the District of Columbia in Claimant's job classification, to which the Claimant could be transferred.

16. Claimant never at any time performed any work activity, within the District of Columbia for the Respondent, American Airlines.

17. Claimant was not paid a travel allowance by the Respondent, American Airlines, for his daily trip from his residence to the District of Columbia, to his place of employment at National Airport, in the State of Virginia.

18. Claimant received his paychecks from American Airlines at National Airport in the State of Virginia.

19. Claimant's period of employment commenced for American Airlines at National Airport, in the State of Virginia.

20. National Airport is located within the territorial limits of the State of Virginia.

21. Claimant's business and personal connections with the District of Columbia are too remote to vest jurisdiction under the District of Columbia Workmen's Compensation Act, to the Claimant's work activities for the Respondent, American Airlines, at National Airport, in the State of Virginia.

22. The claim for compensation filed herein by the Claimant does not come within the jurisdiction of the District of Columbia Workmen's Compensation Act, thus said claim must be denied.

23. In view of the findings contained herein, it is also necessary to deny the petition for approval of an attorney's fee, filed herein by Counsel for Claimant.

ORDER

IT IS THEREFORE ORDERED that the claim filed herein by George Pettus for compensation under the Longshoremen's and Harbor Workers' Compensation Act, as extended to include the District of Columbia Workmen's Compensation Act, is hereby denied.

IT IS FURTHER ORDERED that the petition for the approval of an attorney's fee, filed herein by Counsel for Claimant, is likewise denied.

/s/ SAMUEL J. SMITH
Samuel J. Smith
Administrative Law Judge

Dated: June 30, 1975
Washington, D.C.

CERTIFICATE OF FILING AND SERVICE

I certify that on July 7, 1975 the foregoing Compensation Order was filed in the Office of the Deputy Commissioner, 40th Compensation District and a copy thereof was mailed on July 10, 1975 by certified mail to the parties and their representatives at the last known address of each as follows:

George Pettus, 2551 Elvans Rd., S.E., #302, Washington, D.C. 20032—Claimant

American Airlines, National Airport, Washington, D.C. Commercial Casualty Insurance Company, c/o Joseph Dyer, Esq., Suite 800, The Rosslyn Building, 1911 Ft. Myer Drive, Arlington, Va.

James A. Mannino, Esq., 925 - 15th Street, N.W., Washington, D.C. 20005

Joseph Dyer, Esq., Suite 800, The Rosslyn Building, 1911 Ft. Myer Drive, Arlington, Virginia

A copy was also mailed by regular mail to the following:

Director, Office of Workers' Compensation Programs, (LHWCA), U.S. Department of Labor, Washington, D.C. 20211

/s/ JACK GARRELL
Jack Garrell
Deputy Commissioner
40th Compensation District
U.S. Department of Labor
EMPLOYMENT STANDARDS ADMINISTRATION
Office of Workers' Compensation Programs

If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to

20 percent thereof. The additional amount shall be paid at the same time as, but in addition to, such compensation.

The date compensation is due is the date the Deputy Commissioner files the decision or order in his office.

VIRGINIA
IN THE INDUSTRIAL COMMISSION

Claim No. 266-453

GEORGE PETTUS, *Claimant*

v.

AMERICAN AIRLINES, INCORPORATED, *Employer*
COMMERCIAL INSURANCE COMPANY OF NEWARK, NEW JERSEY,
Insurer

OPINION BY EVANS, COMMISSIONER

February 11, 1974

Review before the full Commission at Richmond, Virginia, on January 3, 1974.

The full Commission on review affirms the Findings of Fact and Conclusions of Law reached by the hearing Commissioner and adopt his decision and award as that of the full Commission. Accordingly, that decision and award is

Affirmed.

IN THE INDUSTRIAL COMMISSION OF VIRGINIA

Claim No. 266-453

GEORGE PETTUS, *Claimant*

v.

AMERICAN AIRLINE:, INC., *Employer*
COMMERCIAL INSURANCE COMPANY OF NEWARK, NEW JERSEY,
Insurer

OPINION BY MILLER, COMMISSIONER

October 9, 1973

Hearing before Commissioner MILLER at Alexandria, Virginia, September 18, 1973.

This case comes on the defendant carrier's application on ground of change in condition asserting the claimant employee refuses to have the medically recommended back surgery (with fusion). Various attention including traction and extended medical therapy and back support have been undertaken without apparent improvement. While working briefly from about July 1, 1972 to July 13, 1972 when compensation was resumed he has been unable to work effectively since he incurred the back injury on May 10, 1972.

The Commission has not received in this file, within the leave of five days granted following the hearing, either a copy of inquiry by claimant's counsel to Dr. S. M. Levin (attending orthopedist) nor copy of any defense counsel's inquiry to the doctor.

The claimant, formerly an airline baggage handler, stated that the reasons for his refusal for the recommended surgery are that "• • • it (improvement) wasn't guaranteed" and that there was a "lot of risks in this operation."

There is no medical evidence of any unusual or excessive risk involved in this particular operation or to this particular person. Moreover, this is recognized as being the customary procedure for possible rehabilitation of such disabling condition where extended conservative attention has not produced improvement.

Furthermore, from this file there appears to be no other remedy or procedure recommended that would further the rehabilitation so as to enable the claimant to attain a fairly reasonable activity level with prospect of gainful employment.

Medical history and opinion reveal the claimant authorized (see May 22, 1972 report) and continued under the attention of Dr. S. M. Levin, orthopedist. On January 4, 1973 Dr. Levin reported the claimant as not improved and concluded, "I again feel surgery is necessary." (See prior surgery recommendation in April 20, 1972 report.) On referral for orthopedic consultation Dr. J. W. Leabhart further suggested a trial corset but indicated if this did not help it would be a "clear cut indication for an L-5 S-1 fusion." The claimant did not improve and surgery-fusion therefore now becomes the indicated treatment. (He was also examined at one point by a neurosurgeon Dr. R. J. Bortnick.)

Thus conservative attention has been tried and lastly the attending and the consulting orthopedists both indicate this to be a case for operative procedure with no other attention to offer. Moreover, there is no medical report recommending against surgery or noting any unusual element of risk.

For somewhat similar cases holding the claimant's refusal and delay unjustified see *Walker* v. *B & G Olsen Co.*, 52 O.I.C. 276 and *Faircloth* v. *Smalley Package Co.*, 46 O.I.C. 87.

The fact that the physician cannot guarantee a risk free operation or certain attainment of full recovery does not render such refusal justified.

Therefore, from a consideration of the entire record it is found that the claimant's refusal to accept the recommended and tendered back surgery is not justified under the facts herein.

AWARD

Accordingly, an award must be and is hereby entered as of May 16, 1973 suspending and terminating payment of compensation under the outstanding award.